No. 89-1598

In The

Supreme Court of the United States

October Term, 1989

EASTERN AIRLINES, INC.,

Petitioner,

v.

ROSE MARIE FLOYD and
TERRY FLOYD, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The petitioner has presented two questions for review – one arising under the Warsaw Convention, and another purportedly arising under the Montreal Agreement. Since Article 17 of the Warsaw Convention (which is the only provision of the Convention in issue here) was not changed in any way by the Montreal Agreement, we believe the two questions are really only a single question. We restate that question neutrally as follows:

> Whether Article 17 of the Warsaw Convention provides a remedy for psychic injury and emotional distress unaccompanied by physical injury, when caused by an accident in international air transportation.

The petitioner has also included in its argument a third question which it suggests that the Court "may wish to address" if certiorari is granted. We will explain in the argument which follows that this third question is not properly before the Court, because it is entirely moot at this point in the proceedings.

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The respondents, Rose Marie Floyd and Terry Floyd, et al., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's decision in this case.

STATEMENT OF THE CASE

Eastern's statement of the case is accurate. Unfortunately, its subsequent argument – which asserts that the Eleventh Circuit's opinion opens the door to a "flood of

fictitious or frivolous claims" for "unlimited damages" not contemplated by Article 17 of the Warsaw Convention – is hyperbolic. The opinion does no such thing, and we deem it prudent to emphasize two aspects of the case briefly to ensure that the Court is not misled by the petitioner's rhetorical excesses.

The flight in question departed Miami International Airport on May 5, 1983, bound for Nassau, in the Bahamas. En route to Nassau, one of the airplane's three jet engines lost oil pressure, and it was shut down by the flight crew. The airplane was turned around to return to Miami. Shortly thereafter, oil pressure was lost on the second and third engines, and those engines failed. Without power, the airplane began losing altitude rapidly, and the passengers were told that the airplane would be ditched in the Atlantic Ocean. Understandably, the engine failures and the announcement of the impending crash landing caused a considerable amount of mental distress among the passengers. Fortunately, after an extended period of descending flight without power, the flight crew was able to restart the engine which had initially been shut down, and land the airplane safely at Miami International Airport.

Following the incident, it was discovered that, during routine maintenance on each engine prior to flight, Eastern's maintenance personnel had failed to install a required "O-ring" to seal against oil leaks. The result was that oil in the engines had been pumped overboard through the gaps left by the omitted O-rings. It was also discovered that Eastern had experienced no less than a dozen prior engine failures for the identical reason, but that Eastern had done nothing to educate its maintenance

personnel or otherwise correct this oft-repeated life-threatening omission. The incident was clearly an "accident" within the meaning of that term in Article 17 of the Warsaw Convention, and the passengers' mental distress was both genuine and severe. At least two of the passengers suffered physical injury from their mental distress.

All of these things were alleged in the several amended complaints (*see* R. 4-11) – and because Eastern obtained a "judgment on the pleadings", all of these things must be accepted as true at this point in the proceedings. There is therefore no basis whatsoever for Eastern's suggestion that the plaintiffs' mental injuries are "fictitious or frivolous", or otherwise undeserving of compensation. The Eleventh Circuit's opinion also does not create liability not contemplated by Article 17; it holds just the opposite – that liability under these circumstances *is* contemplated by Article 17. And because the reasoning by which the lower court reached that conclusion ought to inform this Court's decision as to whether certiorari should be granted, that reasoning deserves to be briefly highlighted here.

The court reasoned as follows:

(1) It is now uniformly recognized that Article 17 of the Warsaw Convention creates a cause of action for personal injury in its own right, instead of merely placing limitations upon recoveries under local law.

(2) The nature of Article 17's cause of action depends upon its "French legal meaning", and must be determined by construction of the official French text,

rather than the unofficial English translation. *Air France v. Saks*, 470 U.S. 392 (1985).

(3) Because Eastern has conceded that an "accident" occurred "on board the aircraft" within the meaning of Article 17, the narrow question is whether the phrase "lésion corporelle" encompasses recovery for purely mental injury, or whether recovery for mental injury is recoverable only when accompanied by a physical impact or physical injury.

(4) French civil law permits recovery for any damage, whether mental or physical; the French legal meaning of "lésion corporelle" is "personal injury", rather than "bodily injury"; and the "impact rule" which Eastern urges as a limitation upon the phrase is an invention of the common law (which has now been relaxed or overruled in almost every jurisdiction) which has no counterpart in French civil law.

(5) The minutes of the 1929 Warsaw Convention itself shed no light on the question. However, the 1966 Montreal Agreement (which modified the Convention in several aspects unrelated to Article 17) uses the phrases "personal injury" and "bodily injury" interchangeably when referring to compensable injuries. The notice to passengers required by the Montreal Agreement also utilizes the phrase "personal injury", instead of the phrase "bodily injury". The authentic English text of the subsequent Guatemala City Protocol also substitutes the phrase "personal injury" for "wounding or other bodily injury" in the translation of Article 17. And all of this subsequent "legislative history" is persuasive of the initial meaning of the phrase "lésion corporelle".

(6) Most judicial decisions which have considered the question have held that Article 17 creates a cause of action for purely mental injury, and the two early decisions which read Article 17 differently are flawed. *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974), is flawed because it construed the English translation rather than the original French text, a construction declared impermissible in *Air France v. Saks, supra*. *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973), is flawed for various additional reasons. And neither case has been followed by any court in the last 15 years on the point in issue.

(7) As a result, Article 17 provides a cause of action for compensatory damages for mental injury, unencumbered by the common law's "impact rule". The damages recoverable are limited to $75,000.00 per claim, unless the plaintiffs prove "wilful misconduct", as the Convention elsewhere provides.

There is an additional reason for the result reached by the Eleventh Circuit which it did not state, but which is worth a rhetorical question here. If (as Eastern contends) the phrase "lésion corporelle" excludes a recovery of damages for mental injury, then how can it include a recovery of damages for mental injury *accompanied* by physical injury (as Eastern concedes it does)? The phrase either includes or excludes such a recovery, but it clearly cannot do both. Therefore, even if the Court should be unpersuaded by the Eleventh Circuit's reasoning, it ought to be persuaded that the correct result was reached.

Finally, we emphasize that, after the Eleventh Circuit's opinion was filed, the Florida Supreme Court held

that a similarly situated plaintiff had no state law causes of action on the facts in this case, because of the common law's "impact rule". (App. C-1). The Eleventh Circuit's opinion expressly notes: "Of course, if there is no state law cause of action, there would be no question of preemption. Our discussion of the preemption issue would become moot." (App. A-32). Eastern's suggestion that the Court "may wish to consider" the Eleventh Circuit's disposition of the preemption issue if it grants certiorari is therefore a suggestion to consider an issue which is now entirely moot.

REASONS FOR DENYING THE WRIT

1. The conflicts relied upon by Eastern are stale and insignificant, and they therefore need no resolution by this Court.

The Eleventh Circuit is the first federal court of appeals to decide the question presented here, so there is no present conflict in the decisional law among the federal appellate courts. And of the nine decisions which presently exist on the question, only two (the very first two to decide the question, more than 15 years ago) have reached a contrary result. One of those decisions – *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973) – is a decision of a United States District Court; and if Rule 10 means what it says, that conflict is too insignificant to justify the extraordinary intervention of this Court. The other decision – *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974) – is a decision of a state court of last resort, so the conflict is obviously a somewhat weightier one. However,

the *Rosman* court analyzed the issue in a manner which this Court later declared impermissible, so the conflict is clearly stale and insubstantial.

As the Eleventh Circuit explained in its thoroughly researched and thoughtfully expressed opinion:

> The *Rosman* analysis was flawed, however, because it failed to consider the French legal meaning of the language in Article 17. The court noted that there was "absolutely no dispute over the proper translation of the liability provisions of the Convention," . . . and that French law therefore was irrelevant in interpreting the Convention once a proper translation was agreed upon. . . .In light of the Supreme Court's holding in [*Air France v.*] *Saks* that the French legal meaning must govern our interpretation of Warsaw, and in light of the considerable negative commentary of *Rosman's* approach, we must reject the *Rosman* analysis. . . .
>
> . . . .
>
> There is a more fundamental problem with the *Rosman* and *Burnett* analysis, the analysis that Eastern urges upon this court. In drawing a sharp distinction between injury caused by physical impact and purely mental injury, the courts in *Rosman* and *Burnett* have taken the common law's distinction between mental and physical injuries and imposed it on Article 17 of the Warsaw Convention, a creation of civil lawyers. . . .As demonstrated earlier in this opinion, there is no such distinction in French law or other civil law systems. We are convinced that *Rosman* and *Burnett* inappropriately imported the common law doctrine.

(App. A-24, A-28-29).

It is also noteworthy, we think, that *Rosman* is considered so flawed that at least one New York state trial court did not even feel obliged to follow it, and reached a contrary result by (correctly) construing the French text of the Convention. *Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670 (S. Ct. 1978). *Rosman's* conclusion has also been uniformly rejected by every United States District Court sitting in New York which has considered the question: *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975); *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977); *Borhum v. Pan American World Airways*, 19 Aviation Cases 18,236 (CCH), 1986 WL 2974 (S.D.N.Y. March 5, 1986). And all other courts which have considered the question since 1974, including the Eleventh Circuit in the instant case, have reached the same conclusion: *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989); *Eastern Airlines, Inc. v. King*, 536 So.2d 1023 (Fla. 1990); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975).

In short, the first two decisions on the issue have now been thoroughly discredited over the last 15 years by seven straight decisions to the contrary, and it seems highly unlikely that those early decisions will ever be followed again. Perhaps this Court's intervention might be appropriate if another federal court of appeals should choose to disagree with the Eleventh Circuit in the future; at the present time, however, no good reason suggests itself why this Court should grant certiorari review of the only decision ever rendered on the question by a federal appellate court.

2. The Eleventh Circuit's decision is correct.

Eastern also argues that the Eleventh Circuit's decision "departs from this Court's rules for the proper construction of the Warsaw Convention", and that the English phrase "bodily injury" simply must incorporate the common law's "impact rule" – and that is essentially all that it argues concerning the merits. In our judgment, the Eleventh Circuit followed "this Court's rules for the proper construction of the Warsaw Convention" to the letter, and it is Eastern which has missed the point here.

According to *Air France v. Saks*, 470 U.S. 392 (1985), it is the official French text of the Warsaw Convention which is controlling, not the unofficial English translation; and words and phrases must therefore be given their "French legal meaning" (470 U.S. at 399), rather than some other meaning which might be evoked by the words used in the English translation. The relevant question here is therefore the meaning of the phrase "lésion corporelle" in French civil law, not the meaning of the phrase "bodily injury" in American civil law – and that, of course, is exactly the task which the Eleventh Circuit undertook in the decision sought to be reviewed. In discharging that responsibility, the court held simply that French civil law permits recovery for any damage, whether mental or physical; the French legal meaning of "lésion corporelle" is "personal injury", rather than "bodily injury"; and the "impact rule" which Eastern urges as a limitation upon the phrase is an invention of the common law (which has now been relaxed or overruled in almost every jurisdiction) which has no counterpart in French civil law.

Eastern has not even bothered to quarrel with the Eleventh Circuit's determination of the "French legal meaning" of the phrase "lésion corporelle". All that it has argued is that the English phrase "bodily injury" ought to be construed to incorporate the common law's "impact rule" in order to protect international air carriers from lawsuits arising out of accidents causing only mental distress. Since the "impact rule" itself has been relaxed or overruled almost everywhere, the argument has little to commend it even under the common law; but quite apart from that fact, the argument is one which this Court simply cannot entertain after *Air France v. Saks, supra*. Before an error can be demonstrated in the Eleventh Circuit's decision, Eastern must demonstrate that the court misread the French civil law.

Since Eastern has not even bothered to suggest such an error in its petition, it ought to be clear that it cannot make such a demonstration on the merits – and no good reason suggests itself why this Court should grant review simply to repeat what it said five years ago in *Air France v. Saks*. In addition, of course, Eastern's concern over liability can be alleviated (indeed, eliminated) simply by ensuring that its own fleet's engines are properly maintained – which is reason enough for this Court to leave the desirable deterrent inherent in the Eleventh Circuit's reading of Article 17 squarely in place.

3. The "additional question" suggested by Eastern is entirely moot.

The concluding section of Eastern's argument suggests that, if certiorari is granted, the Court "may wish to

address" the additional question raised by the Eleventh Circuit's disposition of the preemption issue. As we explained in the concluding paragraph of our statement of the case, and as the Eleventh Circuit expressly anticipated in the decision itself, the Florida Supreme Court's determination that the "impact rule" is alive and well (in Florida, at least) renders this issue entirely moot at this point in the proceedings. We therefore respectfully submit that, even if the Court wished to address the question, the question is not presented and therefore cannot be decided.

CONCLUSION

For these reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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